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SUPREME COURT, U.S.

NO. 01-1496

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT STEWART, on Behalf of Himself
and All Others Similarly Situated,
Petitioners

v.

LYNN ABRAHAM, District Attorney of
Philadelphia County, Individually and in Her Official
Capacity; DISTRICT ATTORNEY'S OFFICE OF
PHILADELPHIA COUNTY
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does petitioner's Fourth Amendment claim, premised on inaccurate representations of Pennsylvania law, state a federal question?

A. Under Pennsylvania law, if a preliminary hearing judge dismisses charges because the Commonwealth has not established a prima facie case as to each element of each crime charged, is the judge employing the same standard used to assess probable cause for arrest under the Fourth Amendment?

B. Does the dismissal of charges at a Pennsylvania preliminary hearing for lack of a prima facie case preclude the Commonwealth from rearresting the defendant on refiled charges?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iii-iv
Constitutional and Statutory Provisions Involved	1
Counter-Statement of the Case	1-4
Reasons for Denying the Writ	
A Pennsylvania trial court finding that a prima facie case has not been established for each element of each crime charged does not undo the earlier Fourth Amendment probable cause determination; no federal claim is presented here.	4-13
Conclusion	14

TABLE OF AUTHORITIES

	PAGE
Federal Cases	
ASCARO Inc. v. Kadish, 490 U.S. 605 (1989)	7
Gerstein v. Pugh, 420 U.S. 103 (1975)	2, 5, 9, 12
Juidice v. Vail, 430 U.S. 327 (1977)	5
Moore v. Sims, 442 U.S. 415 (1979)	5
Ocampo v. United States, 34 S. Ct. 91 (1914)	13
Stewart v. Abraham, 275 F.3d 220 (3d Cir. 2001)	6, 7, 11
Younger v. Harris, 401 U.S. 37 (1971)	4, 5
State Cases	
Commonwealth ex rel. Buchanan v. Verbonitz, 581 A.2d 172, 174 (Pa. 1990)	8, 10
Commonwealth v. Carmody, 2002 W.L. 987989 (Pa. Super. 2002)	10
Commonwealth v. Davis, 454 A.2d 92 (Pa. Super. 1982)	10
Commonwealth v. Marti, 779 A.2d 1177 (Pa. Super. 2001)	8

	PAGE
Commonwealth v. McBride, 595 A.2d 589 (Pa. 1991)	8, 9
Commonwealth v. Moyer, 648 A.2d 42 (Pa. Super. 1994)	10
Commonwealth v. Neckerauer, 617 A.2d 1281 (Pa. Super. 1992)	10
Commonwealth v. Sebek, 716 A.2d 1266 (Pa. Super. 1998)	9
Commonwealth v. Waller, 682 A.2d 1292 (Pa. Super. 1996)	13
In re Riggins, 254 A.2d 616 (Pa. 1969)	13
State Statutes	
Pa.R.Crim.P. 542(D)	2
Pa.R.Crim.P. 544(A), 42 Pa.C.S.	1, 2

The Philadelphia District Attorney's Office respectfully requests that the petition for certiorari be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 544 of the Pennsylvania Rules of Criminal Procedure provides:

> (A) When charges are dismissed or withdrawn at or prior to a preliminary hearing, the attorney for the Commonwealth may reinstitute refiling of a complaint with the issuing authority who dismissed or permitted the withdrawal of the charge.

Pa. R. Crim. P. 544(A), 42 Pa.C.S.

COUNTER-STATEMENT OF THE CASE

Pursuant to its rulemaking authority, the Pennsylvania Supreme Court promulgated new Rule 544 of the

Pennsylvania Rules of Criminal Procedure.[1] Rule 544 became effective on January 1, 2000. Prior to its promulgation, there was no state-wide procedural rule that addressed the reinitiation of charges following their dismissal at a preliminary hearing. Rule 544 was drafted to reflect prevailing practice among Pennsylvania prosecutors, pursuant to well-established Pennsylvania law, under which prosecutors, in the exercise of their discretion, reinstituted charges as long as the statute of limitations had not run and the action was not undertaken to harass the defendant.

Petitioner Robert Stewart was arrested on March 24, 2000, and charged with aggravated assault, simple assault, recklessly endangering another person, and possession of an instrument of crime. Because his crime was a felony, no warrant was required before his arrest. Accordingly, at his preliminary arraignment shortly after arrest, a judicial officer determined that probable cause supported the arrest, and that petitioner could be detained pretrial pursuant to *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975). At the preliminary arraignment, petitioner's case was scheduled for a preliminary hearing. Under Rule 542(D) of the Pennsylvania Rules of Criminal Procedure, at the preliminary hearing the Commonwealth must establish a prima facie case for each offense charged or the charges must be dismissed.

At petitioner's preliminary hearing, the aggravated assault charge was discharged and the case was scheduled for trial on the misdemeanors. The Commonwealth then decided to reinitiate the aggravated assault charge and petitioner was

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[1] This Rule was previously designated Rule 143 and was renumbered by the state Supreme Court effective April 1, 2001.

rearrested pursuant to Rule 544.[2] Petitioner then received a new preliminary arraignment, at which time a judicial officer again determined that there was probable cause for his arrest. Thereafter a preliminary hearing was held on the refiled charges and the court found a prima facie case of aggravated assault.

While petitioner's criminal case was pending in state court, he filed a civil suit in federal court, claiming that, under Pennsylvania law, a preliminary hearing dismissal is nothing more than a Fourth Amendment probable cause determination, and that his rearrest after the dismissal was therefore unconstitutional. He sought a preliminary injunction and class action certification. The District Attorney's Office filed a motion to dismiss. On July 17, 2000, the District Court denied that motion and issued a permanent injunction enjoining the rearrest of Pennsylvania felons after preliminary hearing dismissals, unless a court first approved. The District Court denied the District Attorney's Office's motion for a stay of that order pending appeal. On August 9, 2000, the District Attorney's Office filed Notice of Appeal

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[2] Petitioner chooses to portray the rearrest procedure here as the product of a new "policy" of the Philadelphia District Attorney's Office. Tellingly, however, he makes no argument that the prosecutor's "policy" was in any way inconsistent with the statewide rule of criminal procedure. In reality, the only reason the "policy" changed is that the state rules changed, making clear that Philadelphia could conduct rearrests in the same fashion as in the rest of the Commonwealth. Petitioner, of course, remained free to argue that the practice somehow violated the rule, but such a position would only have highlighted the fact that his claim is in essence one of state law.

and on August 23, 2000, the Third Circuit granted its motion for a stay pending appeal.

On December 26, 2001, the Third Circuit upheld the District Court in declining to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), but reversed on the merits, concluding that rearrest after a preliminary hearing dismissal under Pennsylvania law does not implicate the Fourth Amendment.

REASONS FOR DENYING THE WRIT

A PENNSYLVANIA TRIAL COURT FINDING THAT A PRIMA FACIE CASE HAS NOT BEEN ESTABLISHED FOR EACH ELEMENT OF EACH CRIME CHARGED DOES NOT UNDO THE EARLIER FOURTH AMENDMENT PROBABLE CAUSE DETERMINATION; NO FEDERAL CLAIM IS PRESENTED HERE.

Quite peculiarly for a Fourth Amendment arrest case, this petitioner does not challenge the facts supporting probable cause for his arrest, or for his rearrest. Instead he argues that, because a Pennsylvania preliminary hearing judge found the absence of a "prima facie case" after the initial arrest, the state could not constitutionally rearrest him without first negating the preliminary hearing ruling. The argument depends completely on petitioner's attempt, throughout the litigation below and the certiorari petition here, to confound the Fourth Amendment concept of probable cause with Pennsylvania's state law requirement that, at the preliminary hearing, the Commonwealth must prove -- in an adversary proceeding, with competent, admissible evidence -- a prima facie case to support each element of each crime charged. When these concepts are correctly distinguished in the

manner recognized in *Gerstein v. Pugh*, 420 U.S. 103 (1975), it is quite clear that petitioner's entire Fourth Amendment argument collapses to nothing but a question of Pennsylvania law. Petitioner's attempt to engraft Pennsylvania procedure onto the Fourth Amendment does not merit this Court's review.[3]

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[3] Indeed, the most appropriate disposition of this case in the federal courts below should have been abstention under *Younger v. Harris*, 401 U.S. 37 (1971), to allow the Pennsylvania courts to resolve petitioner's challenge to his rearrest in the context of his then-pending criminal prosecution.

The Court of Appeals declined *Younger* abstention, on the ground that petitioner was challenging the procedure by which he was rearrested rather than the constitutionality of the prosecution in itself. Accordingly, reasoned the Third Circuit, his procedural challenge was not a "defense" to the state charges, and his federal lawsuit would not "interfere" with the prosecution.

This Court has made clear, however, that *Younger* abstention during ongoing state criminal proceedings is required whether or not the federal challenge would constitute a legal defense to the charges; the only question is whether the state criminal defendant's federal claim could have been adjudicated in state court. "[I]t is abundantly clear that appellees had an opportunity to present their federal claims in the state proceedings. *No more is required to invoke* Younger *abstention.*" *Juidice v. Vail*, 430 U.S. 327, 337 (1977) (emphasis added, footnote omitted). *Accord Moore v. Sims*, 442 U.S. 415, 425 (1979).

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As the Court of Appeals observed, there is no suggestion in the record that police lacked probable cause to arrest petitioner pursuant to the Fourth Amendment, nor any suggestion that petitioner was detained for more than 48 hours before a magistrate determined probable cause. "These facts should have ended the matter and mandated summary judgment in defendants' favor." *Stewart v. Abraham*, 275 F.3d 220, 228-229 (3d Cir. 2001).[4]

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In this case, because the rearrest procedure occurs in the context of a pending criminal matter, the pending state prosecution would have been the perfect place for petitioner to litigate his Fourth Amendment claim. *See ASCARO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (state courts "possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law"). But petitioner never even attempted to do so. Instead he preferred to place himself in a different forum for the resolution of the state law issues essential to his Fourth Amendment claim.

[4] What Stewart asks us to do is to deprive Pennsylvania of its right to reinitiate a criminal proceeding in accordance with a generally applicable process that is entirely consistent with the dictates of the applicable Fourth Amendment law. There is no precedent of which we are aware, however, for the proposition that the federal Constitution prohibits the reinitiation of a criminal proceeding in such a manner where double jeopardy has not attached and no pattern of

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Petitioner nonetheless attempts to create a probable cause issue by mischaracterizing Pennsylvania law. Contrary to his argument, however, dismissal of charges at a Pennsylvania preliminary hearing does not constitute a judicial determination that the defendant was arrested without probable cause for purposes of the Fourth Amendment. Rather, as the Court of Appeals observed, a preliminary hearing dismissal is simply a ruling that, at that particular time, the matter should not proceed to trial because the Commonwealth has not met the more stringent burden of establishing a prima facie case as to each element of each crime charged. Id. at 229-30.

In Pennsylvania, the determination of probable cause, for warrantless arrest cases under *Gerstein*, occurs at preliminary arraignment within twenty-four hours after arrest. At this stage, the magistrate does not take evidence or review all elements of the various offenses that may be charged, but considers only whether police had reason to believe that the arrestee committed some crime. This determination of the probability of criminal activity, which the Fourth Amendment requires, is vastly different from the adversarial proceeding required at the preliminary hearing. At the preliminary hearing, which the Fourth Amendment does not require, the court determines whether the Commonwealth has met its burden of offering prima facie evidence of **each** element of **each** charged crime. It is the admissible evidence of guilt -- not the quantum of information known to police at point of arrest -- that is at issue at the preliminary hearing.

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prosecutorial harassment has been alleged.

Id. at 229.

Pennsylvania cases, including the most recent on the question, have consistently recognized the nature of the prima facie standard, which is far different than a Fourth Amendment probable cause determination:

> The Commonwealth establishes a *prima facie* case when it produces evidence that, if accepted as true, would warrant the trial judge to allow the case to go to a jury. The Commonwealth need not prove the elements of the crime beyond a reasonable doubt; rather, the *prima facie* standard requires evidence of the existence of each and every element of the crime charged. . . .
>
> Instantly, in order to allow the case to go to the jury the Commonwealth was required to show probable cause that Appellee (1) attempted to cause or intentionally or knowingly caused (2) bodily injury (3) to a police officer (4) in the performance of his duties.

Commonwealth v. Marti, 779 A.2d 1177, 1179 (Pa. Super. 2001) (citations omitted). *Accord Commonwealth ex rel. Buchanan v. Verbonitz*, 581 A.2d 172, 174 (Pa. 1990) (to satisfy burden of establishing a prima facie case, "the Commonwealth must produce legally competent evidence which demonstrates the existence of each of the material elements of the crime charged and legally competent evidence to demonstrate the existence of facts which connect the accused to the crime charged"), *cert. denied*, 111 S. Ct. 1108 (1991); *Commonwealth v. McBride*, 595 A.2d 589, 591 (Pa. 1991) (to establish a prima facie case, the Commonwealth "is required to present evidence with regard to each of the material elements of the charge and to establish sufficient

probable cause to warrant the belief that the accused committed the offense").[5]

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[5] Although the *McBride* court, like *Marti*, used the term "probable cause" in the course of describing a prima facie case, it is clear from the entire opinion that the court's holding had nothing to do with Fourth Amendment probable cause. Rather, the issue in *McBride* was whether the Commonwealth had made a prima facie showing of one element of the crime of criminal trespass. *McBride*, 595 A.2d at 591-92. In fact, this Court has recognized that the terms are sometimes used interchangeably, without becoming equivalent for Fourth Amendment purposes. The standard of proof required at the preliminary hearing "is usually referred to as 'probable cause,' but in some jurisdictions it may approach a prima facie case of guilt." *Gerstein v. Pugh*, 420 U.S. at 119.

Petitioner cites to *Commonwealth v. Sebek*, 716 A.2d 1266, 1269 (Pa. Super. 1998), for the proposition that "a finding by a magistrate that the Commonwealth did not establish probable cause that the appellant committed the violations for which he was charged is the same as a finding that the Commonwealth did not establish a prima facie case." By his quotation of the words "magistrate" and "probable cause," petitioner apparently hopes to create the impression that the proceeding in question was a *Gerstein* Fourth Amendment determination. In reality, the magistrate in *Sebek* had presided over a *preliminary hearing*. The Superior Court accordingly held that there is "no legal distinction to the choice of phraseology that the magistrate may have employed in dismissing the charges." This holding defeats rather than demonstrates petitioner's assertion that "probable cause," as used in relation to Pennsylvania preliminary hearings, means probable cause as used in the Fourth Amendment.

In application of this heightened prima facie standard, Pennsylvania charges are subject to preliminary hearing dismissal on a wide variety of grounds that would be entirely unavailable in a Fourth Amendment probable cause determination. *E.g.*, *Commonwealth v. Carmody*, 2002 W.L. 987989 *4 (Pa. Super. 5/15/02) (reviewing claim that preliminary hearing court erroneously relied on victim's prior inconsistent statement to find prima facie case); *Commonwealth v. Moyer*, 648 A.2d 42, 46-47 (Pa. Super. 1994) (Commonwealth failed to establish, *inter alia*, causation to support homicide charge, but evidence did support lesser offense); *Commonwealth v. Neckerauer*, 617 A.2d 1281, 1288-89 (Pa. Super. 1992) (no evidence of agreement presented to support conspiracy charge, although other charges were supported); *Commonwealth ex rel. Buchanan v. Verbonitz*, 581 A.2d at 174-75 (prima facie case not established where Commonwealth relied solely on hearsay and accused denied right of confrontation); *Commonwealth v. Davis*, 454 A.2d 92, 96 (Pa. Super. 1982) (preliminary hearing court may not consider defendant's confession unless Commonwealth first establishes corpus delicti).

Thus, under Pennsylvania law, the prima facie inquiry that occurs at the preliminary hearing involves a detailed analysis of the evidence, filtered by trial-like rules of admissibility, and measured against the statutory elements of each crime charged. The quality and quantity of evidence that would be sufficient to permit a judge to submit a case to the jury is obviously far greater than that necessary to permit a Fourth Amendment probable cause determination. The Court of Appeals held correctly that "there is nothing inherently inconsistent between the failure of the Commonwealth to establish a *prima facie* case at the preliminary hearing and the

existence of probable cause for a second arrest." 275 F.3d at 230.[6]

Petitioner's contrary argument is the epitome of empty formalism. He maintains that, because some Pennsylvania cases have used the terms "probable cause" and "prima facie" interchangeably, the phrases must be given identical meaning for Fourth Amendment purposes. It is as if they are magic words that, once uttered, have automatic and even unintended consequences, regardless of the actual context in which they are used. In fact, however, the bases for dismissal at a preliminary hearing -- the unavailability of a witness, for example; the denial of confrontation; the misuse of prior statements; the absence of a corpus for a confession -- are simply unknown in Fourth Amendment jurisprudence. Conversely, the threshold for Fourth Amendment analysis -- detention -- is irrelevant for preliminary hearings; in the absence of a prima facie case, the charges must be dismissed, whatever the defendant's custody status may be.

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[6] Petitioner complains that no new evidence was presented at his second preliminary hearing as compared to the first. He attacks the Court of Appeals for its observation that, in some cases, there will be new evidence. But his argument is a straw man. The existence of new evidence, or of old evidence that was not presented at the original preliminary hearing (which, after all, is not supposed to be a full trial), may certainly provide one motivation for a rearrest after the dismissal of charges at a preliminary hearing. But such additional evidence is not required by any Fourth Amendment principle -- unless, of course, the prima facie standard is falsely equated with probable cause, *see* discussion *supra*, and the prima facie determination is then accorded preclusive effect, *see* discussion *infra*.

In apparent acknowledgment of the problem, petitioner insists that equivalence between probable cause and preliminary hearings is immaterial to his position; he must prevail, says petitioner, even if the standard for establishing a prima facie case is indeed greater than that for probable cause. But this argument quickly collapses, because it turns out to be no more than an assertion that probable cause determinations really *are* the same as preliminary hearings: they have the same general purpose (protecting liberty), and they use the same words (sometimes). Constitutional analysis, however, is not so mechanical. The reality is that Pennsylvania has chosen to provide two levels of protection to defendants before trial: the probable cause determination required by *Gerstein*, and the prima facie determination required by long-established state practice. The states are free to create procedures that are not transmogrified into federal constitutional rights.

Finally, petitioner's claim would be unworthy even if the Court of Appeals had been wrong about the distinct status of preliminary hearing dismissals as a matter of Pennsylvania law. Petitioner's argument that the Commonwealth must seek judicial approval prior to rearrest necessarily elevates the interlocutory dismissal of charges at a preliminary hearing to the level of binding judicial precedent constituting a collateral estoppel or res judicata bar that governs any future arrest. Petitioner proffers a pro forma disavowal of such a collateral estoppel notion; but his position is nonsensical without it. In petitioner's world, what standard would a magistrate apply in reviewing a rearrest request? Probable cause, presumably -- but if a judge has already dismissed the charges at a preliminary hearing, and if such a dismissal equals a finding that no probable cause exists, then by what authority can a second judicial officer rule otherwise? Could the magistrate simply disregard the (now-to-be-imputed)

probable cause determination of the preliminary hearing judge? Must a higher court be consulted?

Petitioner cannot answer such questions. They arise precisely because of the preclusive effect that he must accord to his preliminary-hearing-dismissal-cum-probable-cause-determinations. Yet the certiorari petition is bereft of any authority discerning such a bar within either Fourth Amendment or Pennsylvania precedent. To the contrary, federal and state law reject the idea. *Ocampo v. United States*, 34 S. Ct. 91, 100 (1914) ("A finding that there is no probable cause is not equivalent to acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest"); *In re Riggins*, 254 A.2d 616, 617 (Pa. 1969) ("when the Commonwealth believes that a defendant has been improperly discharged by a committing magistrate its remedy is to have the defendant re-arrested and taken before another magistrate"); *see Commonwealth v. Waller*, 682 A.2d 1292, 1294 (Pa. Super. 1996) (dismissal of charges at preliminary hearing due to failure to establish a prima facie case is an interlocutory decision that cannot be appealed).

As the Court of Appeals correctly found, a preliminary hearing dismissal in Pennsylvania does not undo an earlier probable cause determination under the Fourth Amendment, and has no collateral estoppel effect. The petition for certiorari should be denied.

CONCLUSION

For these reasons, the Commonwealth respectfully requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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